SUPREME COURT, U. S.

FILED

AUG 18 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

LEONARD SIMASKO,
Petitioner,

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondents.

No. 479

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

Attorney for petitioner
RAY H. BOMAN
19382 Kelly Road
Harpre Woods, Michigan 48225
DR. 1-2850

THE INLAND PRESS, DETROIT, MICHIGAN

In The

Supreme Court of the United States

LEONARD SIMASKO,
Petitioner,

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondents.

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

Petitioner, Leonard Simasko, plaintiff below, prays that a Writ of Certiorari issue to review a final decision of the Court of Appeals of the State of Michigan, entered in the above entitled case on January 28, 1969, application or leave to appeal therefrom having been denied by the Supreme Court of Michigan on April 16, 1969, and petitioner's petition for rehearing of its application for leave to appeal having further been denied on May 9, 1969.

OPINIONS BELOW

The Supreme Court of Michigan, in denying petitioner's application for leave to appeal from a decision of the Court of Appeals of the State of Michigan, wrote no opinion. The

opinion of the Court of Appeals for the State of Michigan, rendered on January 28, 1969 is not yet reported in Michigan Appeal Reports or in the Northwest Reports, Second Series. A copy of the denial of petitioner's application for leave to appeal and denial of petitioner's petition for rehearing of its application for leave to appeal and a copy of the opinion of the Court of Appeals for the State of Michigan are appended hereto as Appendices A, B, and C respectively.

Petitioner filed an action to quiet title against a purchaser of delinquent taxes and following a trial in the Circuit Court for The County of Macomb, State of Michigan, a judgment was entered by the Court on December 11, 1967 for the respondents. On January 28, 1969 the Court of Appeals for the State of Michigan in a written opinion affirmed the decision of the trial court. On April 16, 1969, the Supreme Court of the State of Michigan denied petitioner-plaintiff's application for leave to appeal and on May 9, 1969 the Supreme Court of the State of Michigan further denied petitioner-plaintiff's petition for rehearing of application for leave to appeal.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Petitioner in April, 1959, purchased an interest in land owned by Norbert P. Neff, now deceased. Prior to acquiring this interest, however, petitioner's grantor had allowed his property to become encumbered by delinquent taxes. A notice of person claiming interest under tax title (hereinafter referred to as a notice to redeem) was prepared by respondent and served upon petitioner's grantor. The service of this notice was improper and not in accord with the

statute in that it was served by a deputy sheriff outside his jurisdiction. This fact is admitted and herein is where the controversy lies between the parties. Respondent argues that such service although not accomplished according to statute is nonetheless substantial compliance and thus effective. Petitioner argues that according to that part of statute M.C.L.A. 211.140 (Appendix D) dealing with service of the notice to redeem, and the case law of the State of Michigan, that strict compliance as to the service of the notice to redeem must be accomplished to be effective and that to do otherwise is to deny petitioner's right to redeem and hence by intendment a taking of his property without due process of law. Petitioner has steadfastly argued throughout the proceedings in the lower courts that strict compliance with the mandatory provisions of M.C.L.A. 211.140, is the only course authorized by statutory and case law and that a contrary ruling is outside the law and therefore by intendment and clear implication, the thrust of Petitioner's argument has been that his property was taken without due process of law.

The question presented is: Whether substantial compliance as to the service of process of a statutory notice to redeem is sufficient to divest the owner of property of title to the same, and whether such a procedure represents a taking of the owners property without due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On or about July 17, 1958, one Norbert P. Neff, now deceased, was served with a Notice of Redemption at his residence in Grosse Pointe, Wayne County, Michigan, concerning certain lands and premises he then owned in the

Township of Harrison, County of Macomb, State of Michigan. These lands and premises are the subject matter of this suit.

Service of this notice was accomplished by a Deputy Sheriff of *Macomb County,* and not by a Sheriff of Wayne County, where the landowner resided, as provided by Statute M.C.L.A. 211.140 which states in part:

> ". . . if the grantee or grantees, or the person or persons holding the interest in said lands as aforesaid, shall be residents of any county of the state other than the county in which the land is situated, then such return as to such person shall be made by the sheriff of the county where such person or persons reside or may be found . . ."

Thereafter on January 26, 1959, a tax deed in the name of the respondent was recorded in the County Clerk's office of the County of Macomb.

Norbert P. Neff, thereafter, in April of 1959, sold his interest in said lands and premises on a land contract to the petitioner for the sum of $4,500.00. Petitioner then discovered that Neff had not paid delinquent taxes, which were then owing on said property and in April of 1959 made a tender of payment to the respondent so as to remove any encumbrance as to his title, but that said tender was refused by the respondent because it claimed title to the same lands and premises through its tax deed and by the payment of all delinquent taxes then owing. Whereupon petitioner, on April 15, 1959, deposited with the County Clerk of the County of Macomb all sums necessary for the payment of delinquent taxes.

That prior to the instituting of this suit in Macomb County Court, petitioner labored for several years attempting to remove any cloud or encumbrance upon his title. More specifically, petitioner was in correspondence with

both Mr. Neff, his grantor, and the respondent as to the payment of the back taxes, and it appears from the testimony as rendered in the trial court that Mr. Neff, through his attorney, was attempting to get this matter settled and the title cleared in the summer of 1960, but that during the fall of 1960 Mr. Neff, after an extended illness, expired. It further appears from the testimony and acts that Mr. Neff had devised the property in question to Bon Secour Hospital; therefore, at the close of 1960, three parties were claiming an interest in the property which is the subject matter of this lawsuit; the petitioner, through his land contract with Mr. Neff, Bon Secour Hospital as the devisee of Mr. Neff's Will, and the respondent by and through its tax deed.

Thereafter, the hospital refused to bring suit to quiet title against the township, and the petitioner then attempted to negotiate a settlement with the hospital, asserting his land contract with Mr. Neff; however, a settlement was not reached until May of 1963, and then only after a suit had been instituted against Bon Secour Hospital by the petitioner for specific performance of the contract entered into by Mr. Neff.

Petitioner throughout this time had further correspondence with the respondent asserting his title to said property by and through his land contract with Mr. Neff, and further asserting his quit claim deed from Bon Secour Hospital which was duly recorded in 1964. All such discussions with the respondent proved to be fruitless.

The petitioner then, in 1965 contacted his counsel, L. Edwin Wenger, about the possibility of instituting suit to quiet title and after receiving counsel and advise, the petitioner obtained a title policy from the Burton Abstract and Title Company indicating that title was in the petitioner.

It was then decided that the only course of action to pursue was the instituting of a suit to quiet title against the respondent.

A suit to Quiet Title was instituted in March of 1966. Petitioner's basic contention was that he had a valid title to said lands and premises based upon his land contract from Mr. Neff; and, further, his quit claim deed from Bon Secour Hospital; and that the title of the respondent was materially defective in that the latter did not comply with the mode of service of the Notice of Redemption upon petitioner's grantor as provided in the aforementioned Statute M.C.L.A. 211.140, and as further defined by the case law of the State of Michigan.

Specifically, petitioner averred that the Notice of Redemption which was served upon Mr. Neff was ineffective and void as to Mr. Neff and himself (as Mr. Neff's grantee) because the service was made outside the jurisdiction of the serving officer. Respondent admitted to this fact but argued that the intent of the Statute (M.C.L.A. 211.140) rendered its title valid in that they had *substantially complied* with its provisions. The respondent further contended that laches barred any claim that the petitioner might possess.

Upon trial, the sole issue to be determined by the trial court was whether substantial compliance as to the statutory requirements of a Notice of Redemption is sufficient to pass title to the purchaser of a tax deed. In determining this issue, the court had to consider the sufficiency of the Notice to Redeem upon petitioner's grantor. More specifically, the trial court had to determine whether the service of said notice by a deputy of the County of Macomb upon a resident of the County of Wayne in the County of Wayne was a sufficient service of process according to M.C.L.A. 211.140, which states that the service of said notice to redeem *must*

be served by a sheriff of the county in which such person resides. The trial court, however, did not decide this question; instead, the trial court asserted various cases cited in his opinion that the petitioner not having brought suit contesting the tax sale within the statutory period of one year after the date of sale was quilty of laches so as to bar his action. The cases cited by the lower court are all to be found under another section of our Michigan general property tax law, that being M.C.L.A. 211.70 which states in part:

That no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. *In such cases the owner of such lands may move the court at any time within one year after he shall have notice of such sale to set the same aside, and the court may so order upon such terms as may be just. This ruling was in spite of the fact that it was admitted by the parties at trial that the tax sale was not being attacked in any way, shape or means by the petitioner because of the fact that the validity of the tax sale was never in question, the sole issue being the sufficiency of the Notice to Redeem.* The trial court never decided the issue as to the sufficiency of the Notice to Redeem served upon petitioner's grantor.

This judgment was affirmed by the Court of Appeals again on the basis of the provisions dealing with the tax sale M.C.L.A. 211.70 and not on the basis of an interpretation of M.C.L.A. 211.140 dealing with a Notice to Redeem. Petitioner's Application for Leave to Appeal to the Supreme Court was thereafter denied.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the State of Michigan, whose opinion was tacitly adopted by the Supreme Court of Michi-

gan when it denied petitioner's application for leave to appeal therefrom did not address itself to the issues upon which this petition is based. Instead the appellate court affirmed the decision of the Circuit Court for the County of Macomb, Michigan, on grounds that petitioner was guilty of laches under M.C.L.A. 211.70 in not contesting the tax sale within one year.

Petitioner has charged throughout the proceedings below that the statutory procedure with regard to service of the notice to redeem has not been complied with and as such the usual course prescribed by the state statute has been violated, therefore denying petitioner his property by cutting off his right to redeem.

The Michigan Supreme Court, however, has been unanimous in its decisions dealing with the interpretation of the statute in question to the effect that substantial compliance with the statutory requirements in such matters is not sufficient. *Stockwell* v. *Curtis*, 279 Mich. at 392 (1937).

Also citing:

Littlefield v. *Petnick*, 250 Mich. 437, wherein the Court stated that:

> "Proceedings of this kind are statutory, and the requirements of notice is one step in the proceeding to divest the delinquent taxpayer of his property rights. *Something more than substantial compliance with the statute is necessary.* The provision of the statute must be strictly constructed."

Also citing the language of *Teal Lake Iron Mining Co.* v. *Olds*, 178 Mich. at 238:

> "We think the interests of all concerned will be better conserved by holding that this requirement of the statute is mandatory, and must be strictly observed."

and *McVannel* v. *Pure Oil Co.*, 262 Mich. 518, at 522:

> "The effect of proceedings under the tax law, if valid, is to divest the true owner of the title to his property, and to vest the same in the holder of the tax deed, and such proceedings must be closely scrutinized and strictly construed."

All of these cases however, together with the statutory command of M.C.L.A. 211.140 have been disregarded by the courts below to the effect that petitioner's property, now worth many thousands of dollars, is being taken from him without the safeguards of statutory and case law mandate above cited and to the contrary of petitioner's constitutional rights under the due process and equal protection provisions of the 14th Amendment of the United States Constitution.

In addition to the above cases, petitioner has repeatedly cited *Richeson* v. *Wager,* 287 Mich. 79 (1938). In this case, the plaintiffs successfully contended that the Notice to Redeem served upon the parties, who conveyed their interests to the defendants, was defective in part because the return of service showed that a Notice to Redeem was served on one R. D. Weinberg (defendant's grantor) in Gladwin County, where the property in question was located, *by a deputy sheriff of Genesee County.* Plaintiffs were the heirs of Weinberg and attacked such service contending that it was invalid. The Michigan Supreme Court, in a unanimous decision upheld plaintiff's contention saying:

> "In the case at bar the return of service shows service of notice on Ronald D. Weinberg by a deputy sheriff of Genessee in the County of Gladwin. *Such service being made by a deputy sheriff outside of the jurisdiction where he may lawfully serve such papers is a nullity* and is not in compliance with the requirements of I Comp. Laws 1929, Section 3535 . . ." 287 Mich. at 83. (now MCLA 211.140)

The same reasoning should be applied to the instant case

for here we have almost an identical fact situation with a deputy sheriff of Macomb County making a service upon a resident of Wayne County which is quite clearly outside his jurisdiction and "Such service being outside of the jurisdiction where he may lawfully serve such papers is a nullity and is not in compliance with the requirements of the law."

Petitioner further cites *Turpin* v. *Lemon,* 187 U.S. 51, 23 S. Ct. 20, 47 L. Ed. 70 (1902), wherein petitioner sought to overturn the validity of certain tax deeds. The basis of petitioner's contention was that the return of the sheriff did not show that he had compiled with the procedure set forth by state statute. The Supreme Court in denying petitioner's relief, thereby affirming the decision of the lower court stated:

> *"If the plaintiff had alleged that in proceedings for the sale of these lands the sheriff had failed to comply with the law,* and the defendant had pleaded that by the curative section (25) irregularities not appearing of record would not vitiate the deed, *the constitutionality of that section would properly be raised . . .* (emphasis added)

This language represents the heart of the instant case for in every stage of the proceedings below petitioner herein has continually stated that the service of the notice to redeem was not in accord with the Michigan Statute M.C.L.A 211.140 and case law thereunder but nonetheless all of the judicial minds before whom petitioner has been heard have turned a deaf ear to his plea and as such have effectively taken his property right of redemption away from him without due process of law.

The Court also stated at page 23 of *Turpin* that the 14th Amendment would appear to be satisfied by a showing that *the usual course prescribed by state laws* required notice to

the taxpayer and was in conformity with natural justice. (Emphasis added).

Taking this language we ask ourselves: What then is the usual course prescribed by the state law of Michigan regarding the giving of notice to a taxpayer? Quite simply, M.C.L.A. 211.140 provides that the service of the notice upon the taxpayer be made by a sheriff of the county where such person or persons reside or may be found. This procedure however was not done, as was admitted in the original pleadings, at trial, and as found by both the trial and appellate courts, and therefore, the usual course prescribed by M.C.L.A. 211.140 was never accomplished thus violating petitioner's constitutional rights of due process and equal protection under the 14th Amendment.

Furthermore in all the cases cited by petitioner to the lower courts, the impropriety of the notice to redeem in the several cases cited had the effect of defeating the holder of the tax title, yet under similar facts petitioner in the instant case is treated in a different light. Petitioner asks: Can this uneven-handedness in the administration of justice as codified by the statute and case law of the State of Michigan require a different result from that of previous decisions? If the answer be in the affirmative then clearly there has been a violation of the equal protection provision of the 14th Amendment.

Petitioner also cites *Straus* v. *Foxworth,* 231 U.S. 161, 34 S. Ct. 42, 58 L. Ed. 168 (1913). In *Strauss* as in the present suit petitioner filed an action to quiet title alleging various grounds for setting aside the tax title, stating among other items, that there had not been compliance with the various statutory provisions. To this the Court in answer replied:

"The supreme court of the territory held, in effect,

> that compliance with these statutory provisions was not essential in a constitutional sense to the validity of tax sales, and therefore that the territorial legislature was free to declare that non- compliance should not render the sales invalid; . . ."

Now contrast this with the rulings of the Michigan Supreme Court in *Stockwell* v. *Curtis,* supra; *Littlefield* v. *Petnick,* supra; *Teal Lake Iron Mining Co.* v. *Olds,* supra; *McVannel* v. *Pure Oil Co.,* supra; *Richeson* v. *Wager,* supra, and one thing stands out clearly: That something more than substantial compliance with the statute is necessary. It therefore follows that since in the instant case substantial compliance with the law is all that has been accomplished petitioner has thereby been deprived of his rights to the property in question by having had his right to redeem nullified without due process of law.

Respondent having only substantially complied with the statutory provisions of M.C.L.A. 211.140 in derrogation of the statutory command and case law thereunder, the decision of the Michigan Court of Appeals was clearly erroneous and of the effect of taking petitioner's property away from him in violation of the Constitutional precepts of the due process and equal protection provisions of the 14th Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAY H. BOMAN
19382 Kelly Road
Harper Woods, Michigan 48225
DR 1-2850

APPENDIX A

L. EDWIN WENGER
THEODORE ANTHONY CARIS
OF COUNSEL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable
THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS G. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associate Justices

Leonard Simasko,
Plaintiff and Appellant
vs. No. 52360
Township of Harrison,
Macomb County,
Defendant

On the order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reasons that plaintiff and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the

State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of April in the year of our Lord one thousand nine hundred and sixty-nine.

DONALD F. WINTERS, Clerk.

APPENDIX B

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 8th day of May in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable
THOMAS E. BRENNAN,
Chief Justice,
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
PAUL L. ADAMS,
THOMAS G. KAVANAGH,
Associates Justices

Leonard Simasko,
Plaintiff and Appellant
vs. No. 52360
Township of Harrison,
Defendant

On order of the Court, the petition for rehearing of the order of April 16, 1969, denying leave to appeal is considered, and the petition is DENIED, for the reasons that it is not shown that said order was erroneously entered, and the rules do not provide for such rehearing.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and sixty-nine.

DONALD F. WINTERS, Clerk.

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 2

LEONARD SIMASKO,

Plaintiff-Appellant,

v. No. 4913

TOWNSHIP OF HARRISON, MACOMB COUNTY,

Defendant-Appellee.

BEFORE: QUINN, P. J.: McGREGOR and BRENNAN, JJ.

PER CURIAM.

In 1966, plaintiff filed an action to quiet title against defendant, who held a deed under a delinquent tax sale in 1958. The lower court entered a judgment dismissing the complaint and quieting title in the defendant on the basis of laches.

Plaintiff contends that laches did not bar his suit because improper notice of redemption was served on his grantor, according to CL 1948, § 211.140 (Stat Ann 1960 Rev § 7.198). The statute requires service of the notice on the last grantee of record by the sheriff of the county of the grantee's residence or of the county where the grantee may be found. Here, a deputy sheriff of an adjoining county served plaintiff's grantor.

The trial judge did not err by finding plaintiff guilty of laches, thus barring his equitable remedies. Laches, designed to protect future innocent parties from the failure promptly to assert a right, arose after a reasonable time following plaintiff's grantor's notice of the 1958 tax sale. *Aztec Cooper Co.* v. *Auditor General* (1901), 128 Mich. 615; *Cook* v. *Hall* (1900), 123 Mich. 378. Furthermore, a landowner who has notice that his land has been sold for taxes

must have the sale set aside in circuit court within one year thereafter, no matter how he obtained notice. *Odgers* v. *Lentz* (1947), 319 Mich. 502. The lower court correctly determined that plaintiff had notice of the tax sale and that the lengthy delay in filing his action against defendant precluded plaintiff's successful assertion of rights in the property.

Affirmed.

APPENDIX D

M.C.L.A. 211.140 which states in part:

"Provided, that if the grantee or grantees, or the person or persons holding the interest in said lands as aforesaid, shall be residents of any county of the state other than the county in which the land is situated, then such return as to such person shall be made by the sheriff of the county where such persons or persons reside or may be found: . . .